

In the Matter of)
Closed Captioning of Video Programming) CG Docket No. 05-231
Telecommunications for the Deaf, Inc.)
Petition for Rulemaking)
)

The Radio-Television News Directors Association (“RTNDA”), by its attorney, respectfully submits its comments in response to the *Notice of Proposed Rulemaking* adopted by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.¹ RTNDA is the world’s largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news executives in broadcasting, cable and other electronic media in more than 30 countries.

¹*In the Matter of Closed Captioning of Video Programming, Telecommunications for the Deaf, Inc., Petition for Rulemaking, Notice of Proposed Rulemaking*, CG Docket No. 05-231, FCC 05-142 (rel. July 21, 2005) (“*NPRM*”).

In the Telecommunications Act of 1996, Congress prescribed that video programming generally be closed captioned to ensure access to people with hearing disabilities.² RTNDA participated in the rulemaking proceedings that resulted in the implementing rules ultimately adopted by the Commission.³ Especially as they pertain to local news programming, these rules evidence a careful balance between the desire to make video programming accessible to the deaf and hearing impaired and Congress' stated desire that the rules not result in a loss of programming choices or a diminution in available local news and public affairs programming.

As a general matter, RTNDA believes that increasing the availability of programming that is accessible to the hearing impaired is a laudable goal. News organizations and local stations have demonstrated a firm commitment to affording disabled Americans access to news programming. Even prior to the adoption of the closed captioning rules in 1997, RTNDA's members had expended considerable resources to achieve this goal. In the years since the rules' adoption, RTNDA has worked hard to educate its members regarding their obligations for closed captioning and the provision of emergency information. RTNDA's members are making every effort to comply with the Commission's benchmark for 100% captioning of new, non-exempt English programming come January 1 of next year. And local stations have implemented plans to make critical information accessible to the deaf and the hearing impaired during emergencies.

² 47 U.S.C. § 613. Section 713, Video Programming Accessibility, was added to the Communications Act of 1934 by Section 305 of the Telecommunications Act of 1996. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).

³ See *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Report and Order, 13 FCC Rcd. 3272, 3387, ¶ 10 (August 22, 1997) ("Closed Captioning Report and Order"); see also *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, MM Docket No. 95-176, Order on Reconsideration, 13 FCC Rcd 19973 (1998) ("Reconsideration Order").

While the amount of available captioned video programming has burgeoned over the past eight years, some things have not changed significantly. Real-time captioning remains prohibitively expensive, particularly for local news operations in medium and small markets. And the number of available trained captioners apparently has not increased sufficiently to accommodate an extension of the requirement for real-time captioning of local news beyond network affiliates in the Top 25 Designated Market Areas (“DMAs”). RTNDA’s members indicate that further limiting the circumstances under which ENT is permissible would result in staff cuts, diminished newsgathering capabilities, fewer local newscasts and even cessation of news operations. RTNDA submits, therefore, that the Commission should not alter its rule permitting the use of ENT captioning in small and medium markets.

Further, RTNDA asks that the Commission qualify its “no exceptions” approach to enforcement of the rule governing the accessibility of emergency information to account for the extraordinary circumstances that may attend coverage of emergency situations and so as not to impede journalists’ ability to get critical information out to the public at large as quickly as possible.

RTNDA’S INFORMAL SURVEY

To develop information concerning the captioning of local news programming, RTNDA conducted an informal survey of its members. Of the approximately 100 member stations that responded, all caption their local news programming using some type of captioning technology. Captions are monitored frequently, and problems addressed promptly. Where real-time captioning is used, stations rely on captioning vendors to monitor quality control.

The Commission’s rules currently require network affiliated stations in the top 25 markets to real-time caption their news programming in order to have that programming count

toward the closed captioning benchmarks. The majority of stations within the top 25 DMAs responding to RTNDA's survey report that they real-time caption all of their local news programming. Those that do not currently have live captioning report that it will be in place as of January 1, 2006. Notably, a significant number of responding stations in major markets have not been successful in obtaining sponsors to underwrite the costs of news captioning. According to the respondents, the costs of real-time captioning runs about \$150 per hour. While dependent upon the amount of local news programming a station broadcasts, expenses in larger markets appear to average between \$15,000 and \$30,000 per month. Some quoted as much as \$500,000 per year.

Non-network affiliated stations within the top 25 markets and stations outside of those markets are permitted to use ENT, in which captions come from the text in the station's news script computers. Based on the results of RTNDA's informal survey, however, there are stations outside the top 25 markets using live captioning, and many are using a combination of ENT and real-time captioning. Generally speaking however, the majority of stations in smaller markets rely on ENT captioning, particularly those in markets 75 and higher.

Whether or not local newscasts are real-time captioned appears to be dependent upon whether the station has received a grant, or the cost of real-time captioning is otherwise underwritten. Those stations fortunate to be receiving outside monies for real-time captioning of some or all of their local news programming cautioned that grants often are given for a finite period of time, and many are set to expire (e.g., grants from the U.S. Department of Education or state entities). Others stated that sponsorships are not always consistent.

Without exception, small and medium market stations have expressed concerns that if the requirement for real-time captioning of local newscasts is expanded beyond network affiliates in

the top 25 markets, their local news operations will be placed under tremendous financial strain. That burden would be further amplified should real-time captioning become mandatory on their digital multiplex channels. Most indicated that they have researched costs; reported estimates approximate those cited in major markets—approximately \$150 per hour. For most local news operations in small and medium markets, this amounts to no less than \$100,000 in additional expense per year. As one news director stated, “each \$20,000 spent on real-time closed captioning means we lose one news staffer, and our coverage suffers.” One local cable news channel explained that a real-time requirement would cause the channel to cease operation, stating, “it would be a significant portion of our operating budget and it would not be practical to offset that through staff reductions, the only variable we control.”

In fact, respondents from outside the top 25 markets universally indicate that if real-time captioning of local newscasts were mandatory, staff reductions or potentially reduced local news service would result. Notably, those that use real-time captioning services in small and medium markets complain that despite high cost, quality is often poor. Even where budgets have allowed for live captioning, or where operations have attempted to contract for real-time captioning of emergency other late-breaking news coverage, respondents have had difficulties locating available captioners. As one put it, if the real-time requirement were extended outside the Top 25 markets, “I don't think that all the commercial captioners together have the capacity to handle all the stations that would need them.” Several suggest that voice recognition technology may serve to bring down costs for stations, improve quality, reduce the need for trained captioners and make local news programming fully accessible to the deaf and hearing impaired, but that this technology is as yet unreliable.

THE COMMISSION SHOULD CONTINUE TO PERMIT THE USE OF ELECTRONIC NEWSROOM TECHNIQUE TO MEET CAPTIONING REQUIREMENTS IN SMALL AND MEDIUM MARKETS

In the *Closed Captioning Report and Order* and again in the *Reconsideration Order*, the Commission appropriately declined to adopt any limits on the methodology that can be used to create closed captioning and permitted the use of ENT. The FCC expressly recognized the high cost of real-time captioning, the limited numbers of captioners, the undue burden a real-time captioning requirement would place on many local news operations, and the potential for reductions in news programming outside the largest markets.⁴

Admittedly, ENT can only be used to convert the dialogue included on a teleprompter script into captions. As many live newscasts use interviews, field reports and late-breaking weather and sports that cannot be scripted or presented in technical or graphical form, persons with hearing disabilities sometimes do not have full access to local news programming when ENT is used.

Despite ENT's drawbacks, its use does not render local news programming virtually inaccessible to the deaf and hearing impaired. Even non-scripted elements of news programming that are not captured by ENT can be communicated in other ways or at other times, *e.g.*, through the use of graphics or crawls. Weather reports and even sports segments are typically graphic and visual. A late-breaking news report that is broadcast initially without captions can often be communicated to hearing impaired viewers through captions only minutes later, in a recap of the story, after a script has been prepared.

The Commission's decision to permit the use of ENT balanced the perceived disadvantages of this technique against the high cost of live captioning and the dearth of

⁴ *Closed Captioning Report and Order*, 13 FCC Rcd at 3311-12; *Reconsideration Order*, 13 FCC Rcd at 19991.

available captioners. While eight years have passed, RTNDA respectfully submits that captioning costs have not decreased such that little hardship would result if the Commission were to further limit the circumstances under which captions created using ENT would be allowed to count as captioned programming. Moreover, it does not appear that sufficient captioners would be available to satisfy increased demand.⁵

If the Commission requires the use of real-time captioning beyond news broadcasts by network affiliates within the Top 25 DMAs, far more local stations will find the cost of captioning burdensome and reduce the amount of local news they provide or otherwise divert resources from newsgathering functions. Reporters would be lost. Medium and small market stations might be forced to discontinue local news broadcasts altogether. Small stations in large markets with limited market share, which typically have a limited audience base, would have no means through which through which to justify real-time captioning economically, and would be forced to remove local news programming from their schedules.

It certainly cannot have been Congress's intent though Section 713 to impact negatively upon the quality and local nature of news broadcasts. Such a result would be inconsistent with the public's interest in preserving diversity of programming, and contravene the Commission's longstanding efforts to ensure that local programming responds to the needs of the community—efforts the FCC has reinvigorated in recent years.

RTNDA does not disagree with those who suggest that, because of its high-quality and ability to caption all aural portions of a newscast, from the perspective of the hearing impaired, real-time captioning is preferable. In fact, the results of RTNDA's survey demonstrate that, many member stations have voluntarily implemented real-time captioning in markets where the

⁵ "Caption-Makers For Live TV are Few and Far Between," Cox News Service (Mar. 26, 2004).

FCC's rules do not so require. As the marketplace continues to evolve, it is clear that demand for real-time captioning will remain on the upswing. Studies indicate that closed captioning is a desirable component of video programming not only for the 28 million Americans who are hearing impaired, but for tens of millions of others who rely on captioning in health clubs, airports, bars, and other venues.⁶ At the same time, it is anticipated that live captioning costs will decrease, and technology will improve. Full access to local news programming and other live programming may well come through voice recognition technology, but the Commission should allow additional time for this and other closed captioning technologies to advance.

RTNDA believes that real-time captioning of local newscasts will become increasingly ubiquitous in small and medium markets. At present, however, it would be premature for the FCC to phase-out the use of ENT captioning. The rationale underlying the Commission's adoption of rule permitting the use of ENT remains valid. More onerous captioning requirements would cripple financially strapped news departments, force stations to divert resources from newsgathering functions and/or to discontinue the provision of certain news and information programming, thus diminishing both the quality and quantity of local news programming, to the detriment of all viewers.

COMMISSION ENFORCEMENT OF THE RULE GOVERNING THE ACCESSIBILITY OF EMERGENCY INFORMATION MUST TAKE INTO ACCOUNT

While the Commission's *NPRM* does not specifically seek comment its rule governing the accessibility of emergency information to the deaf and hearing impaired, it does state that the FCC welcomes comments "on any other issues relevant to the topics addressed in this *NPRM*." RTNDA believes it appropriate, therefore, to address the concerns of its members regarding

⁶ National Court Reporters Association White Paper on Captioning, released September 2005, available at www.ncraonline.org/infonews/press/FedInitiative/whitepaper.pdf ("NCRA White Paper").

Section 79.2 (b)(1)(i), 47 C.F.R. § 79.2(b)(1)(i), (the “Rule”) in the context of this rulemaking proceeding.

In recent months, the FCC’s Enforcement Bureau has issued several Notices of Apparent Liability (“NALs”) containing sizable fines against television station licensees in San Diego, Florida, and Washington, DC for alleged failures to comply with the Rule. Certain of those licensees have challenged the NALs issued by the Commission. Without reference to the particulars of those situations, RTNDA cautions the FCC that draconian application the Rule will serve only as a disincentive for television stations to serve the public interest by providing immediate and extensive information concerning emergency situations.

RTNDA’s members recognize that it serves the public interest for stations to provide all viewers, including the deaf and hearing impaired, with critical details regarding emergency situations. In fashioning the Rule and in expressly declining to impose across-the-live captioning requirements, however, the FCC sought to accommodate the real-world circumstances in which news coverage is provided. The Commission did not adopt a standard of 20-20 hindsight review where stations are subject to major and ever-increasing fines if they fail, despite strong efforts to comply with the Rule, to provide nearly simultaneously all information that is discussed in the audio during coverage of an emergency situation—coverage that may continue wall-to-wall over a period of several days.

RTNDA respectfully submits that application of the Rule should consider the realities of news production, including technical and human constraints, when covering breaking news. Emergency situations often do not occur at times when news coverage is scheduled, or when a facility is fully staffed. Personnel may have difficulty reaching the station; both persons and facilities are often at risk. Still, there are countless examples across the country of local news

organizations shifting into high gear to keep their viewers fully informed in cases where health and safety might be threatened, whether in the case of wildfires, hurricanes, floods, or terrorist attacks. In times of weather emergencies, natural disasters, civil disorders or other volatile situations, news organizations often provide round-the-clock coverage, serving as a lifeline to local audiences. The Commission need only look to the heroic and documented efforts of local broadcasters during Hurricanes Katrina and Rita as proof.

By requiring “simultaneous or nearly simultaneous” presentation of aural and visual critical emergency information, however, the FCC places broadcast newsrooms in an untenable situation. To meet the Commission’s requirements, broadcasters may be forced to withhold emergency information from the general public until such time as real-time captioning can be activated or appropriate personnel can be in place to prepare visuals or crawls so that any hearing impaired viewers may receive the information at the same time as the general audience, lest they risk FCC sanction.

The “no exceptions” approach the Commission thus far has taken in enforcing the Rule, threatens to eviscerate the type of extraordinary public service broadcasters routinely provide. In times of crisis, many means of making information accessible may not be reliable — captioners at remote locations may not be able to dial in or otherwise listen to a station’s audio, and numerous technical failures may occur. Or station personnel making Herculean efforts just to keep the station on the air may not have the means to monitor or otherwise be notified that real-time closed captioning has been dropped. RTNDA understands that the Commission has stated that broadcasters may make emergency information available through such simple methods as writing on a blackboard, but in certain critical situations, even a blackboard and chalk or pen and paper may not be available.

In emergency situations, it is not uncommon for station anchors to go live to an on-scene reporter who is asking a local official for details about any given emergency situation, or to take phone calls from viewers about conditions in the area. Obviously, these on-the-spot interviews are not scripted, and the interviewees may give information pertinent to the emergency situation. In RTNDA's experience, where stations determine that available information consists of critical details about the situation (and the station can verify that information), they move quickly to create crawls or graphics with the particulars. In providing fast-paced news gathering and reporting and absent providing essentially real-time captioning (that is, having one or more persons monitor each and every aural statement made by reporters or others and having the equipment and facilities necessary to transcribe the most critical details, as determined on the fly by those individuals, into a visual transmission format), there inevitably will be some difference in timing and in the precise information supplied aurally and visually.

RTNDA respectfully submits that the Commission should clarify that while making information accessible to the hearing impaired is an imperative, the Rule's requirements should not obstruct the larger objective of providing as much information to the public at large as quickly as possible. Unscheduled news coverage is a vast undertaking, requiring quick thinking and mobilization of management, on-air, production and engineering staff, often in the midst of the dangerous situation itself. Many stations provide extensive coverage of emergency or other late-breaking news situations that is valuable to viewers, to law enforcement, and to fire departments. Where stations demonstrate an extraordinary commitment to localism, public service and their communities at great expense and personal risk to members of their staffs, the FCC must accord those stations some flexibility, and evaluate complaints that they have violated the Rule in the context of their efforts as well as the difficulties they may have encountered.

Draconian application of the Rule will serve only to discourage local stations from pursuing timely and aggressive news coverage. Stations would eliminate risk of FCC fines by sending their news teams away to safety and showing Three Stooges re-runs. This, of course, is not what the majority of local stations would choose to do. Providing the greatest possible number of viewers with important information is the very essence of electronic journalism. The superb public service efforts of local news operations do extend to providing critical details to the hearing disabled; indeed, it is in the best interest of electronic journalists that their efforts be directed toward making their programming the programming all viewers turn to in critical situations.

CONCLUSION

Because news organizations have responded overwhelmingly to the challenge of providing greater access to news programming for the hearing impaired, and because captioning technology eventually will improve and costs decrease, no further regulation of closed captioning as it pertains to news programming is necessary. The marketplace will drive a phase out of ENT captioning. Expansion of the requirement for real-time captioning of local news beyond network affiliates in the top 25 DMAs at this time would harm the integrity of news operations, the diversity of programming available to all viewers, and the quality and localism of the news and information provided to many of our nation's viewers. In addition, with respect to the rule governing the accessibility of emergency information to deaf and hearing impaired, in assessing compliance, the Commission should consider the extraordinary circumstances that may have been faced and the overall efforts made

by electronic journalists. RTNDA further believes that the FCC should make clear that the Rule was not intended to obstruct the larger objective of providing as much information to the public at large as quickly as possible, and should apply it accordingly.

Respectfully submitted,
**THE RADIO-TELEVISION NEWS DIRECTORS
ASSOCIATION**

By: /s/ Kathleen A. Kirby
Kathleen A. Kirby
WILEY REIN & FIELDING LLP
1776 K Street NW
Washington, DC 20006
202.719.3360

Its Attorney

November 10, 2005